IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.422 OF 1987.

Ramchandra Krishnath Gund,
since deceased by his heirs,
1A. Nagnath Ramchandra Gund.
1B. Bhagwan Ramchandra Gund.
1C. Mallikarjun Ramchandra Gund.
1D. Utareshswar Ramchandra Gund.
1E. Sidheshwar Ramchandra Gund.
1F. Susheelabai Ramchandra Gund.
1G. Kausalaya Laxman Jadhav. ... Appellants.

Versus.

1. Santosh Chandrakant Gund,
   Age 12 minor by his guardian
   mother Respondent No.3.

2. Savita Chandrakang Gund,
   Age 10 years, a Minor by her
   guardian-mother, Respondent No.3.

3. Mainabai Chandrakant Gund,
   Age 32, residing at Bhatmabare
   Taluka Barshi, Dist.Solapur.

4. Padminibai Krishnath Gund,
   Age 54, residing at House No.
   951, Kasba, Taluka Barshi,
   Dist. Solapur.
   (S.A.stand abatred as against
   Respondent No.4 as per Court's
   order dt.13.1.2005.)

5. Hanmant Krishnath Gund,
   Age: 39, residing at House No.
   951, Kasba, Taluka Barshi,
   Dist.Solapur.

6. Kalabai Dasu Thorat, Age: 49
   residing at Yawali (Tadwale),
   Taluka Barshi, Dist.Solapur. ... Respondents.

Shri M.R.Deshpande for the Appellants.

None for the Respondents.

CORAM : ABHAY S.OKA, J.
DATED : 28th November, 2007.

ORAL JUDGMENT.:

1. Heard Shri Deshpande appearing for the Appellants. The Appellants are the legal representatives of the original 4th Defendant. With a view to appreciate the submissions made by the learned Advocate for the Appellants it will be necessary to briefly refer to the facts of the case. For the sake of convenience the parties are hereinafter referred to with reference to their status in the trial Court.

2. The 1st to 3rd Respondents herein are the original Plaintiffs. The 4th Respondent herein is the 1st Defendant against whom the appeal already stands abated. The 5th and 6th Respondents are the second and third Defendants respectively to the suit. The suit relates to the various properties which are more particularly described in paragraph 1 of the plaint. In so far the present second appeal is concerned, the subject matter is the land bearing Gat No.12 at Alipur, Taluka Barshi, District Solapur. One Krishnath had two wives. The 4th Defendant Ramchandra is the son born to the said Krishnath from the first wife. The 1st Defendant is the second wife of the said Krishnath. Chandrakant and Hanmant (2nd Defendant) are the sons of

Krishnath born to the 1st Defendant. Chandrakant is no more and the Plaintiffs are the legal representatives i.e. son, daughter and widow of the said Chandrakant. The 3rd Defendant is the sister of the 1st Defendant.

3. In so far as the land bearing Gat No.12 is concerned, it is contended that Krishnath was cultivating the said land as an agricultural tenant and by sale deed dated 29th December 1967, the said land bearing survey No.12 (hereinafter referred to as "the disputed land") was purchased by Chandrakant and Hanmant (2nd Defendant). Reliance has been placed on the deed of partition dated 25th January 1961 which records the partition effected by and between the 4th Defendant, the deceased Chandrakant and 2nd Defendant during the lifetime of their father. The disputed property is not the subject matter of the said deed of partition.

4. According to the case of the Plaintiff a part of the said property was sold by the deceased Chandrakant to the 3rd Defendant by sale deed dated 13th August 1973. On 22nd July 1975 the deceased Chandrakant sold another part of the said property in favour of the 3rd Defendant. The allegation in the plaint is that on 21st February 1974 the 2nd Defendant by practicing undue influence obtained a writing in the form of partition. In the suit a declaration is claimed as regards the

documents dated 21st February 1974, 13th August 1973 and 22nd July 1975. The prayer is made for partition and separate possession of one half share of the Plaintiff.

5. The suit was contested by various Defendants by filing separate written statements. The 1st and the 2nd Defendants filed written statement contending that the 4th Defendant had 1/3rd share in the disputed property. The third Defendant also filed a separate written statement. The said written statement does not deal with the disputed property as the 3rd Defendant has nothing to do with the disputed property. The 4th Defendant filed a short written statement contending that he must get his share in the suit property. There is no specific contention raised by the 4th Defendant as regards Gat No.12.

6. The trial Court decreed the suit by holding that the Plaintiffs are entitled to 1/3rd share in the land bearing Gat No.12. The trial Court directed that the property cannot be partitioned without the permission of the Collector. In the separate Appeals preferred by the 1st and 3rd Defendants as well as the Plaintiff, the Appellate Court modified the decree by holding that the 4th Defendant will not have any share in the disputed property as the same was purchased by the deceased Chandrakant and the 2nd Defendant by sale deed dated

29th December 1967. The Appellate Court held that in the year 1961 the 4th Defendant got separated and therefore, the disputed property will go to Chandrakant and to the 2nd Defendant. The Appellate Court, therefore, modified the decree by holding that the Plaintiffs being the heirs of Chandrakant will have one half share in the disputed property.

7. The Second Appeal was admitted by this Court on 25th November 1984 by observing that ground Nos.1 and 2 of the Memorandum of Appeal are the substantial questions of law. Grounds Nos.1 and 2 read thus:

1. Was the Court below correct in modifying the decree in respect of the Gat No.12 (Survey No.6/1), situate at Alipur, when admittedly the same was tenanted land by Krishnath under the Bombay Tenancy and Agricultural Lands Act, 1942?

2. With great respect, it is submitted that the Court below has totally failed to consider that in the partition deed dated 25th January 1961 Exhibit 100, Gat No.12 was excluded from partition since it was the tenanted property and Krishnath had become owner of the same under the

Tenancy Act on the Tiller's Day i.e. 1st April, 1957 and after his death the Appellant Chandrakant and Hanmanth were all entitled to be the owners thereof under section 43 of the Tenancy Act.

8. The submission of the learned Advocate for the Appellants is that Krishnath was admittedly an agricultural tenant in respect of the disputed property on the tiller's day i.e. 1st April 1957 and therefore, all the legal representatives including the 4th Defendant were entitled to a share in the said property. He submitted that in view of this legal position, the 4th Defendant could not have been deprived of his share in the disputed property.

9. I have considered the submissions. It must be stated here that in the plaint there is an averment that Krishnath was an agricultural tenant in respect of the disputed property. However, it is not stated that he was the tenant even on the tiller's day. The plaint refers to the sale deed dated 29th December 1967 by which the deceased Chandrakant and 2nd Defendant purchased the disputed property. In the written statement filed by the 4th Defendant no case has been made out that Krishnath was the tenant in possession of the suit property on the tiller's day and hence he is a

deemed purchaser of the disputed property. In fact in the written statement there is no challenge to the sale deed dated 29th December 1967. Moreover the 4th Defendant did not step into the witness box.

10. Apart from the aforesaid aspects, the Appellate Court referred to a deed of partition dated 25th January 1961 to which the deceased Chandrakant, 4th Defendant, 1st Defendant and the 2nd Defendant are parties. The said registered deed of partition refers to the partition effected during the lifetime of Krishnath and factum of the said partition has been incorporated in the said partition deed. The said document also refers to a sale deed having executed in favour of the deceased Chandrakant and Hanumant in respect of two specific properties. The Appellate Court has held that at the time of partition, the 4th Defendant did not claim any share in the disputed property. It is pertinent to note that at no stage the 4th Defendant challenged the sale deed in respect of the disputed property executed in favour of the deceased Chandrakant and the 2nd Defendant. Considering all these aspects, a finding of fact has been recorded by the Appellate Court that the 4th Defendant was not entitled to any right, title, interest or share in the disputed property. In the absence of any pleadings by the 4th Defendant and in the absence of any evidence led by the 4th Defendant, the

contentions raised in the Second Appeal cannot be accepted. There is no merit in the Second Appeal and the same is accordingly dismissed. No order as to costs.

Judge.